No. 1, Original.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

The United States of America, by and through Nicholas Murray Butler,

Complainant,

vs.

Robert E. Ely, Commissioner of Education of the State of New York,

Defendant.

BRIEF FOR THE COMPLAINANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA EX REL. Nicolai Mensevich, appellant, *v.* ROBERT E. TOD, COMMISSIONER OF IMMIGRATION at the Port of New York. } No. 148.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEE.

STATEMENT.

The Motion to Dismiss or Affirm which was presented to the Court on October 19, 1923, was accompanied by a full statement of the material facts of this case, so far as they appear in the Transcript of Record. The decision of the Court to postpone consideration of the Motion until the hearing of the cause upon the merits renders necessary the statement of certain additional facts not appearing in the record, of which the Court will take judicial notice.

In 1795 the Kingdom of Poland was destroyed and its territory partitioned by the concerted action of Prussia, Russia, and Austria. From then until 1919

73596—23——1

there was no sovereign State of Poland, although there were portions of Germany, of Russia, and of Austria which were peopled almost exclusively by persons of Polish nationality.

During the course of the World War the Polish people asserted their right to a place in the Family of Nations as a sovereign State. To this the Government of Russia assented by proclamation on March 30, 1917, and on January 22, 1919, the United States officially recognized the Republic of Poland. Its representatives took part in the negotiation of the Treaty of Versailles, and on June 28, 1919, executed it along with the other signatory powers. (Senate Document No. 85, 66th Congress, 1st session.) On the same day a separate treaty with Poland was signed by representatives of the Principal Allies and Associated Powers, and later transmitted to the Senate of the United States, but failed of ratification. (Senate Document No. 82, 66th Congress, 1st session.)

The restoration of Poland as a sovereign State did not operate, however, to restore to her the precise territory which had been hers prior to her dissolution in 1795. By the Treaty of Versailles her boundaries were left indefinite and uncertain, to be fixed by subsequent action of the Principal Allied and Associated Powers, after plebiscite or treaty. (Treaty of Versailles, Art. 87.) On the north, west, and south she was bordered by States which were signatories to the Treaty of Versailles, and these boundaries were definitely fixed prior to the date of

the making of the order of deportation in this case on September 30, 1921. The eastern boundary, between Poland and the Soviet Republic of Russia, however, was not definitely fixed until the signing of the treaty of Riga on November 23, 1922.

From 1919 to 1922 the territory lying between the Curzon line, which ran irregularly north and south from Lithuania to Czechoslovakia, and the eastern boundary of Poland as finally fixed, was claimed by Poland and was actually under her administration and control. Within this territory known as the "Polish Occupation" lay the Province of Grodno, in which is situated the town of Tychny or Cichaniny, from which the Appellant emigrated to the United States in 1911. (R. 83–84.)

The Treaty of Riga, which terminated the struggle between Poland and the Soviet Republic on November 23, 1922, defined the eastern boundary of Poland, and as so defined the Province of Grodno lies in Poland. This boundary line was officially recognized by the Council of Ambassadors on March 14, 1923, and by the United States on March 23, 1923.

For the convenience of the Court, certain official communications from the Department of State, which supply such facts as we have stated above and which are not of common knowledge, have been printed as an appendix to this brief.

It thus appears that in 1911, when the Appellant emigrated to the United States, he came from the Province of Grodno, which was then a part of Russia.

In 1921, when the order for his deportation was made, this Province lay in the territory known as the "Polish Occupation," which was controlled and administered by Poland but not officially recognized as lying either within or without the boundaries of that State. To-day this Province is unquestionably part of Poland.

The statement which we made on page 8 of the Motion to Dismiss or Affirm, that—

> the only arguable proposition presented is whether, in view of the change in the political status of the Province of Grodno, a warrant directing the deportation of the relator to Poland is authorized by the Act of Congress,

is borne out by this statement in the Brief for Appellant accompanying his Brief in Opposition to the Motion (page 2):

> We do not, therefore, press the claim that Mensevich is not legally subject to deportation.
>
> We stand solely upon the point that the order for his deportation to Poland, as "the country whence he came," is an arbitrary and unconstitutional excess of power.

ARGUMENT.

I.

This appeal does not involve the construction or application of the Constitution of the United States, within the meaning of section 238 of the Judicial Code, and should be transferred to the Circuit Court of Appeals.

Section 20 of the Immigration Act (Act of February 5, 1917, ch. 29, 39 Stat. 890) provides, in part—

> That the deportation of aliens * * * shall * * * be to the country whence they came * * *.

The order for deportation made by the Secretary of Labor in this case directed that he be returned (R. 10)—

> "to Poland, the country whence he came."

It is manifest that in making this order the Secretary construed the word "country," as used in the statute, to mean the territory or land from which the appellant had come, and employed the term "Poland" to designate it, because that land was under the control and administration of Poland. Whether this construction was correct, or whether, as the appellant contends, the word "country" means the sovereignty to which he owed allegiance when he left Europe, is the only question involved in this case. We think it is clear that it does not "involve the construction or application of the Constitution of the United States" within the meaning of that clause as used in section 238 of the Judicial Code.

In *Empire State-Idaho Mining Co.* v. *Hanley*, 205 U. S. 225, 232, Mr. Justice Day said:

> It has been repeatedly held that it is only when the Constitution of the United States is directly and necessarily drawn in question that such an appeal can be taken, and the case must be one in which the construction or application of the Constitution of the United States is involved as controlling.

In *American Sugar Refining Co.* v. *United States*, 211 U. S. 155, an appeal was taken from a judgment of the District Court directly to this court. There, as in the instant case, an executive officer of the Government had made certain orders and regulations which were alleged to be in excess of his statutory powers, and the appellant urged that in so doing he had exercised legislative power in violation of the Constitution. This Court held that the case did not involve the construction or application of the Constitution, saying at page 161:

> Such direct appeals, under section 5 of the Act of 1891, can not be entertained unless the construction or application of the Constitution of the United States is involved.
>
> This is conceded, and counsel for appellant attempt to sustain the jurisdiction on the ground that the regulations assumed to add something to the dutiable standard prescribed by the tariff act, and that in doing so the Secretary exercised legislative power confided by the Constitution solely to Congress. But this does not constitute a real and substantial dis-

pute or controversy concerning the construction or application of the Constitution upon which the result depends.

The admitted duty of the Secretary of the Treasury was to construe as best he could the paragraph relating to collection of duty upon sugars, and to promulgate regulations for carrying it into effect. Rev. Stat., sec. 251. This and this alone he did. The only real substantial point involved is whether or not he misconstrued the statute, and that gives this court no jurisdiction upon direct appeal. *Sloan* v. *United States*, 193 U. S. 614, 620, and cases cited; *United States ex rel. Taylor* v. *Taft, Secretary*, 203 U. S. 461.

The case at bar is parallel. Under the facts presented here it became necessary for the Secretary of Labor to interpret the phrase "the *country* whence he came." He placed his interpretation upon it and made his order. In the language just quoted, "This and this alone he did. The only real substantial point involved is whether or not he misconstrued the statute, and that gives this court no jurisdiction upon direct appeal."

See also:

Carey v. *Houston & T. C. Ry. Co.*, 150 U. S. 170, 181.

In re Lennon, 150 U. S. 393.

Chin Fong v. *Backus*, 241 U. S. 1.

Ketchum v. *Burr*, 245 U. S. 510.

That the question of statutory construction is the only question here involved appears clearly from

paragraph 8 of the petition for writ of habeas corpus, wherein the question is first raised (R. 3); from the traverse to respondent's return (R. 84–85); from the second request made to the District Court to take judicial notice (R. 85); from the sixth, seventh, and eighth assignments of error (R. 88–89); and from the fact that the brief for the Appellant is devoted almost entirely to a demonstration of the proposition that Poland is not the "country whence he came."

What is the constitutional question which the Appellant believes to be involved? We find it thus stated in the Brief in Opposition to the Motion to Dismiss (pp. 1–2):

> Under a statute authorizing him to deport an alien to "the country whence he came," has the Secretary of Labor power to deport an alien to a country which indisputably is *not* the country whence he came?

It is urged, as we understand, that an alien held for deportation under an order which is beyond the statutory authority of the Secretary is deprived of his liberty without due process of law in the same manner as if the order were within his statutory authority but were without any evidence whatever to sustain it; and that therefore the case involves the application of the Fifth Amendment. (See Brief for Appellant, page 13.)

The difficulty is that the application of the Constitution is too remote to be a controlling issue. If the

order of deportation be beyond the statutory authority of the Secretary of Labor, why that is an end of the matter. (*Gegiow* v. *Uhl*, 239 U. S. 3; *United States* v. *Redfern*, 186 Fed. 603.) It is void because it is without any lawful warrant. No application of the Fifth Amendment is necessary, nor can the constitutional restriction make it any more void.

If this be a case in which the construction or application of the Constitution is involved within the meaning of section 238 of the Judicial Code, then, as Mr. Chief Justice Fuller said in *World's Columbian Exposition* v. *United States*, 56 Fed. 654, 667, "every case arising under the laws of the United States might be said to involve the construction or application of the Constitution, or the validity of such laws."

The appellant, in his Brief in Opposition to the Motion, has called attention (pages 4–5) to the Act of September 14, 1922, chap. 305, 42 Stat. 837, which added a new section to the Judicial Code and provided for the transfer of cases to the Circuit Court of Appeals where appeals had been improperly taken to this court. We concur with the suggestion of the Appellant that in this case the question involved is one for the Circuit Court of Appeals, and that the appeal here should not be dismissed but should be transferred to the Circuit Court of Appeals for the Second Circuit.

73596—23—2

II.

Poland is the "country whence he came."

The word "country" has more than one meaning. It may be used in a political sense to refer to a sovereign State or jurisdiction, or it may be used in a geographical sense to refer to certain land or territory.

Thus it has been held that within the meaning of certain revenue laws the word "country" embraces all the possessions of a State, however widely separated, which are subject to the same supreme executive and legislative control.

Faber v. *United States*, 221 U. S. 649.
Faber v. *United States*, 157 Fed. 140.
Pearcy v. *Stranahan*, 205 U. S. 257.
Stairs v. *Peaslee*, 59 U. S. 521.
United States v. *The Recorder*, 27 Fed. Cas. 718.

On the other hand, the word "country," as used in 12 Stat. 557, is used in a local or geographical sense (*Campbell* v. *Barney*, 4 Fed. Cas. 1157, 1158). In still other cases the word has been construed to refer to States of the Union. (*In re Farez*, 8 Fed. Cas. 1007, *Mansell's Adm'r.* v. *Israel*, 6 Ky. (3 Bibb) 510, 514.)

It is a question of construction in each case. In the case at bar the question is whether Congress intended that an alien should be deported to the land or territory from which he had come, or whether he should be deported to that sovereign State to which he owed allegiance at the time he came.

A reading of section 20 of the Act of February 5, 1917, chap. 29, 39 Stat. 890, indicates clearly that it was the intention of Congress that an alien, when deported, should be returned to the place from which he came, so that he might be restored as nearly as possible to the situation in which he stood immediately prior to his emigration. The only circumstance under which this is not to be done is one specifically provided for by that portion of the section which provides that—

> If such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their reentry, or imposes any condition upon permitting reentry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States.

In addition to the fact that, as we believe, this intention on the part of Congress is evident from the language of the Act, we find that the contrary construction, for which the Appellant contends, would produce absurd results in the administration of the Act. If the word "country" refers to the sovereignty to which the alien owed allegiance at the time he came to the United States, then in the case of one who was a Russian citizen in 1911 and owed allegiance to the Imperial Russian Government, he could not be deported at all. The sovereignty

to which he owed allegiance no longer exists. A new one has been created. It is not material to inquire here whether the allegiance of this alien, who resided in the United States at the time of the change of government in Russia, was transferred from the Czar to the Soviet Republic, for in any event it would no longer be possible to deport him to any "country" to which he owed allegiance at the time he came here.

Again, if this construction be correct, an alien who came here from England might be deported to Australia, and landed at a port on the side of the globe opposite to his original home. Both are a part of the British Empire to which he owes allegiance. A construction of the statute which would permit such a result should obviously be avoided, if another and more reasonable construction may be found.

The Appellant says, however, that these results merely indicate that the Act of Congress was framed without a consideration of the possible changes which might take place in the boundaries of various States. (See Brief, p. 17.) This may be true, but it furnishes no reason why the Act should not be construed in accordance with its obvious intent and purpose, so that aliens who came here from a certain land or territory should, when deported, be returned to that land or territory regardless of any changes which may have taken place in the sovereignty which is in control of that land.

In the Brief for Appellant the following cases are cited to sustain the second point, that "the order of deportation to Poland was unauthorized and arbitrary, and inconsistent with due process of law" (see Brief for Appellant, pp. 13–16):

Lewis v. *Frick*, 233 U. S. 291.

United States v. *Redfern*, 186 Fed. 603 (Dist. Ct.).

United States v. *Ruiz*, 203 Fed. 441 (C. C. A., 5th Cir.).

Ex parte Gytl, 210 Fed. 918 (Dist. Ct.).

Yee Suey v. *Berkshire*, 232 Fed. 143 (C. C. A., 5th Cir.).

United States v. *Sisson*, 206 Fed. 450 (C. C. A., 2d Cir.).

Ung Bak Foon v. *Prentis*, 227 Fed. 406 (C. C. A., 7th Cir.).

Bun Chew v. *Connell*, 233 Fed. 220 (C. C. A., 9th Cir.).

Singh v. *United States*, 243 Fed. 557 (C. C. A., 9th Cir.).

Lee Ching v. *Collector of Customs*, 33 Philippine Reports 329.

To these might have been added:

Lavin v. *Le Fevre*, 125 Fed. 693 (C. C. A., 9th Cir.).

Ex parte Wong You, 176 Fed. 933 (Dist. Ct.).

Lee Sim v. *United States*, 218 Fed. 432 (C. C. A., 2d Cir.).

Ex parte Halkides, 291 Fed. 585 (Dist. Ct.)

An examination of these cases is interesting in their bearing both upon the jurisdiction of this Court and upon the construction of the statute. On the jurisdictional question it is significant that every one of the nine cases which were appealed went to the Circuit Court of Appeals. The only one which came before this Court was brought here on writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit. Neither counsel nor the courts in these cases seem to have considered the constitutional question which is alleged to be controlling in the case at bar. In all of the fourteen cases the question is properly treated as a question of statutory construction.

In their bearing upon the construction of the statute, we find that these cases did not call for a construction of the word "country," but rather of the phrase "whence he came." They were cases of aliens who, after leaving the land of their nativity, had established or claimed to have established a domicile in in some other country, from which latter country they had come into the United States. The question in each case was whether the former or the latter were the country *whence they came*. We think the distinction between these and the case at bar is obvious.

The remaining case of *Ex parte Matthews*, 277 Fed. 857, cited by the Appellant, turned upon the absence of proof in the record of certain material facts, and did not call for a construction of the statute.

CONCLUSION.

We respectfully submit that the sole question involved in this case is one of statutory construction, that it does not "involve the construction or application of the Constitution," and that it should be transferred to the Circuit Court of Appeals for the Second Circuit, in accordance with section 238 (a) of the Judicial Code. And upon the question of construction we submit that the word "country" must be construed to mean the land or territory from which an alien came, regardless of any change which may have taken place since his emigration in the sovereignty which controls or administers such territory.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.
GEORGE ROSS HULL,
Special Assistant to the Attorney General.

NOVEMBER, 1923.

APPENDIX.

Copy: GAE: SS.
M. E. A.

DEPARTMENT OF STATE,
Washington, March 26, 1923.

The honorables the SECRETARY OF STATE, the SECRETARY OF COMMERCE, and the SECRETARY OF LABOR.

GENTLEMEN: This Government is advised that the eastern frontiers of Poland, embracing the areas described as Eastern Galicia and as the Pinsk region in the list of quotas for each country and district for the fiscal year 1922–1923, approved by yourselves jointly, June 12, 1922, pursuant to section 2 (c) of the Act to limit the immigration of aliens into the United States, approved May 19, 1921, and as amended by a Joint Resolution approved May 11, 1922, have been recognized by the Council of Ambassadors as belonging to Poland and as subject to its sovereignty. This Government takes cognizance of that decision, which is in harmony with the assertions of territorial sovereignty by Poland.

I, therefore, have the honor to inform you that this Government acknowledges and recognizes the areas described as Eastern Galicia and the Pinsk region in the list of quotas above mentioned, to be a portion of the territory embraced under the sovereignty of Poland.

I am, gentlemen,

Your obedient servant,

(S) CHARLES E. HUGHES.

AGREEMENT OF THE SECRETARIES OF STATE, COMMERCE, AND LABOR.

Copy: GAE: SS.
M. E. A.

On June 12, 1922, under Public Resolution No. 55, 67th Congress, a Joint Resolution approved May 11, 1922, extending the operation of the Immigration Act of May 19, 1921, quotas were fixed for the Pinsk region, which in 1910 was a part of Russia, and for Eastern Galicia, which in 1910 was a part of Austria.

The three Secretaries having been informed by the Secretary of State on March 26 that the United States now acknowledges and recognizes the areas described as Eastern Galicia and as the Pinsk region in the list of quotas above mentioned to be a portion of the territory embraced under the sovereignty of Poland, it is agreed that for the balance of the present fiscal year the quotas of these two regions shall be merged with that of Poland.

CHARLES E. HUGHES,
Secretary of State.
HERBERT HOOVER,
Secretary of Commerce.
JAMES J. DAVIS,
Secretary of Labor.

Approved March 26, 1923.

In reply refer to
File No. 760C.6115/8. Diplomatic Serial No. 189.

DEPARTMENT OF STATE,
Washington, April 10, 1923.

To the Diplomatic Officers of the United States:

GENTLEMEN: At its 209th meeting, March 14, 1923, the Conference of Ambassadors at Paris recognized the frontiers of Poland (1) with Russia as laid down by the Treaty of Riga of November 23, 1922; (2) with Lithuania as existing at present. The Embassy at Paris reported that the effect of this decision was merely to validate existing conditions.

The Embassy added confidentially that, as a result of a request by both patries, no reference was made to the frontier between Poland and Latvia. The Polish and Lettish Governments desire to make a separate agreement, as it is feared that any pronouncement by the Conference might stir up nationalistic feeling in both countries.

On March 26 the Secretary of State addressed a letter to the Secretaries of State, Commerce, and Labor, who are charged with the administration of the Restrictive Immigration Act, advising them that this Government took cognizance of the decision of the Conference of Ambassadors, above cited, which was in harmony with the assertions of territorial sovereignty by Poland and effectively attributed to Poland the regions of Pinsk and Eastern Galicia. (See Instruction No. 128 of June 28, 1922.) On the basis of this letter the three Secretaries agreed that for the remainder of the present fiscal year the immigration quotas heretofore maintained for these two regions should be merged with that of Poland.

Subsequently the Polish Minister at Washington inquired if this Government would be disposed to

communicate to the Polish Government some expression in the nature of "good wishes" upon the settlement in the manner indicated of the eastern boundaries of Poland. The Department communicated this fact to the American Legation at Warsaw and informed the Legation that it was the general policy of the Department to avoid participating in purely European territorial adjustments and to accept such adjustments, when effected by the governments concerned, as facts with respect to which this Government was not called upon to express either approval or disapproval. The Legation was authorized in this case to communicate to the Polish Government the fact that the Government of the United States "has taken cognizance of the decision of the Council of Ambassadors at Paris March 14, 1923, with regard to the Polish frontiers, which was in harmony with the assertions of territorial sovereignty by Poland."

The foregoing is communicated for your information.

I am, Gentlemen,

Your obedient servant,

For the Secretary of State:

WILLIAM PHILLIPS.

Index under:
Poland:

Diplomatic officers informed re recognition of the frontiers of, by Conference of Ambassadors at Paris at 209th meeting, March 14, 1923, of which Government of United States has taken cognizance.

Embassy or Legation File No. 715.

○